MOTION FILED
NOV 10 1983

No. 83-586

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

SHELL PETROLEUM N.V.,
Petitioner,
v.
MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, Individually and as Members of, and GERALD H. GOLDBERG, Individually and as Executive Officer of, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE UNITARY TAX CAMPAIGN LIMITED AS AMICUS CURIAE

MARLOW W. COOK
(Counsel of Record)
COOK, PURCELL, HENDERSON & ZORACK, CHARTERED
1015 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 659-1050
Counsel for the Unitary Tax Campaign Limited as Amicus Curiae

November 10, 1983

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Lewin, *Unitary Tax Scope Widens*, N.Y. Times, Oct. 18, 1983, at D2, Col. 1 9
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MOTION FOR LEAVE TO FILE BRIEF OF THE UNITARY TAX CAMPAIGN LIMITED AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Unitary Tax Campaign Limited hereby moves this Court for leave to file a brief as *amicus curiae* in the above-captioned case. Counsel for petitioner has consented to the filing of the attached brief by letter on file with the Clerk of this Court. The consent of counsel for respondents was requested but refused. This motion and the

accompanying brief are submitted within the time permitted by Rule 36.1 of the Rules of this Court.

The petition for certiorari presents questions of the standing of a company headquartered in the Netherlands to enforce its rights in U.S. courts under the U.S. Constitution, international law, and an applicable post-war treaty of friendship, commerce and navigation. The attached brief sets forth the significance of this case for the constitutional and other rights of companies headquartered in a country (the United Kingdom) that is not a party to such a treaty.

The interest of the Unitary Tax Campaign Limited as *amicus curiae* is set forth at pages 1-4 of the attached brief.

Respectfully submitted,

MARLOW W. COOK
(Counsel of Record)
COOK, PURCELL, HENDERSON
& ZORACK, CHARTERED
1015 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 659-1050
Counsel for the Unitary
Tax Campaign Limited
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BRIEF OF THE UNITARY TAX CAMPAIGN LIMITED AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of the Unitary Tax Campaign Limited ("UTC") in support of the petition for certiorari. The UTC is an organization of major corporations headquartered in the United Kingdom. It was organized for the express purpose of combatting the use by California and a number of other states of the worldwide unitary tax method—the practice that is challenged by petitioner's complaint in this case. The UTC presents its views to the Court to emphasize the significance to it of the issues presented by this case.

The member corporations of the UTC are among the principal foreign corporations that invest in the United States through subsidiaries incorporated in American states.[1] Of the total of $101.8 billion of foreign direct investment in the United States in 1982, nearly one-quarter—or $23.3 billion—derived from businesses headquartered in the United Kingdom, many of which are UTC members.[2] Businesses based in the United Kingdom earned approximately 40 percent of all income derived by foreign companies from direct investment in the United States.[3] The gross annual turnover of the U.S. subsidiaries of UTC members exceeds $15 billion.

UTC members have been particularly burdened by the double taxation that results from California's worldwide unitary taxation method, and at least two have declined to invest in states employing that method. For example, application of the California worldwide apportionment method during the 1967-1973 period nearly tripled the average effective California tax rate (from 7.27 to 20.99 percent) on the U.S. subsidiary of Unilever Group, the parent of a UTC member.[4] BAT Industries plc, a UTC member that indirectly owns Brown & Williamson Tobacco Corporation and other well-known American companies, has stated to the U.S. Treasury Department that its U.S. subsidiary (BATUS, Inc.) has avoided locating manufacturing plants in California because of the unitary tax burden.[5] And Costain Group plc, a UTC mem-

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[1] Annex A to this Brief lists the members of the UTC supporting the petition for certiorari.

[2] Bureau of Economic Analysis, United States Department of Commerce, *Foreign Direct Investment in the United States in 1982*, 63 Survey of Current Business 31, 32, 36 (Aug. 1983, No. 8).

[3] *Id.* at 40.

[4] Response of BAT Industries plc to U.S. Treasury Department Questionnaire on Worldwide Combined Reporting at 8-9 (June 6, 1982).

[5] *Id.* at 14.

ber, has specifically declined to consider investment in Florida because of that state's recent adoption of the worldwide unitary taxation method.[6]

The UTC has repeatedly expressed its opposition to unitary taxation. It joined several British companies in a brief as *amicus curiae* in *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*,[7] a case involving application of worldwide combined reporting to U.S.-based multinational businesses.[8] The UTC has also made its views known to the British Government. That Government has made repeated diplomatic protests to the U.S. Government[9] and joined in a brief submitted to the Court in this case by the ten member states of the European Communities as *amici curiae*,[10] all in an attempt to resolve the problem engendered by the aberrational taxing method employed by California. And retaliatory legislation was recently proposed in the British Parliament.[11]

This case involves the right of a foreign parent company to challenge the validity of worldwide unitary taxation in the U.S. courts. The decision below denied standing to petitioner Shell Petroleum N.V., a Netherlands parent company with subsidiaries in the U.S. and around the world, to demonstrate that application of California's unitary tax to its income and that of its U.S. and non-U.S. subsidiaries violates the U.S. Constitution, the

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[6] *See* p. 9 & n.19 *infra*.

[7] 51 U.S.L.W. 3937 (U.S. July 6, 1983) (dismissing appeal).

[8] Brief of *Amici Curiae* Allied Lyons P.L.C., *et al.*, (filed U.S. Jan. 6, 1982) (No. 81-849).

[9] Protests by the British Government to the U.S. Government are set forth in Annex B to this Brief.

[10] Brief of the Member States of the European Communities as Amici Curiae (filed U.S. Nov. 10, 1983).

[11] *See* Notice of Amendment to 1983 Finance (No. 2) Bill to Amend the Income and Corporation Taxes Act 1970, § 497, tabled in the House of Commons July 14, 1983.

Netherlands-U.S. Friendship, Commerce, and Navigation ("FCN") Treaty,[12] and customary international law. Although the denial of standing does not directly affect the treaty rights of British companies,[13] it would, unless corrected by this Court, destroy their rights to obtain an adjudication of the constitutionality (and validity under customary international law) of the controversial unitary tax imposed on their income. Moreover, dismissal of petitioner's complaint for lack of standing means that UTC members, like petitioner, will be unable in the future to vindicate constitutional and international law claims concerning other regulation of their business activity in the United States. The UTC therefore has a significant interest in the disposition of this petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Application of the unitary tax method to the combined incomes of foreign parent companies and their worldwide subsidiaries raises serious constitutional issues. The lower courts' refusal to adjudicate those issues raises an equally important question of the ability of foreign parent companies to vindicate their rights under the U.S. Constitution. Those issues are of great significance to companies, such as the members of UTC, that are based in countries that do not have FCN treaties with the United States. Unless the decision below is reversed, parent corporations

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[12] Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942.

[13] The commercial treaty between the United States and the United Kingdom, in force since 1815, does not contain specific provisions concerning host country taxation and other regulation of companies of the other treaty party comparable to those contained in the modern U.S.-Netherlands FCN Treaty signed in 1956. *See* Convention to Regulate Commerce, July 3, 1815, United States-United Kingdom, 8 Stat. 228, T.S. No. 110; United States Department of State, *Treaties in Force* 178 (Jan. 1, 1988).

located in such countries, as well as companies of countries that are parties to such treaties, may be foreclosed in future litigation from obtaining an adjudication of their rights in the United States.

A foreign parent company should have standing to contest the constitutionality of the worldwide unitary method, because the parent bears the burden of international double taxation and heavy compliance costs imposed by that method. The inability of the parent to obtain an adjudication of the lawfulness of this practice may disrupt mutual international investment and U.S. foreign relations. Foreign parent corporations, without recourse to protect their U.S. business investments in U.S. courts, may reconsider the wisdom of maintaining those investments or of making any future investments. Any chilling of trade and investment activity between the United States and the United Kingdom will inevitably create additional friction between the two governments. And the growing likelihood of retaliatory actions by the United Kingdom or other nations, or of reciprocal rulings against U.S. companies in British courts, could impair the investments of U.S. corporations abroad.

ARGUMENT

The lower courts' decision, if not corrected by this Court, will effectively prevent the adjudication of the lawfulness of a controversial practice that threatens seriously to disrupt international relations and investment activities. The decision therefore should be reviewed now.

I. Application of the Unitary Tax Method to the Combined Incomes of Foreign Parent Companies and Their Worldwide Subsidiaries Raises Serious Constitutional Issues.

As this Court recognized in the *Container* case, California's unitary taxing scheme represents a "serious divergence" from the "accepted international practice" of applying the "arms-length" income allocation method.[14] Although the Court upheld the unitary method as applied to the income of a U.S. parent corporation and its foreign subsidiaries, the majority carefully reserved the issue of whether it was constitutional to apply that method to the income of a U.S. subsidiary, its foreign parent company, and the foreign parent's non-U.S. subsidiaries. The majority expressly recognized that the result might be different in the latter case,[15] and the three dissenting Justices expressed their view that such an application clearly would be unconstitutional.[16]

Petitioner is now attempting to litigate the important constitutional issues left open in *Container*. Petitioner seeks to prove that its income is being subjected to international double taxation because of the divergence between the unitary method and the arm's-length method. In addition, petitioner seeks to distinguish *Container*, and therefore establish that respondents have violated the Foreign

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[14] *Container Corporation of America v. Franchise Tax Board*, 103 S. Ct. 2933, 2951-52 (1983).

[15] *Id.* at 2952 n.26 and 2956 n.32.

[16] *Id.* at 2957-61 (Powell, J., dissenting).

Commerce Clause, by showing that application of the unitary method to the income of foreign parent companies has led to repeated objections by foreign sovereigns and has led to actual and threatened retaliation that harms the foreign relations of the United States.[17] The lower court decisions deny petitioner the right even to attempt such a showing.

II. If a Foreign Parent Company Injured by California's Taxing Method May Not Challenge That Method, No Adjudication of the Serious Constitutional Issues Raised In This Case Will Be Available.

Although the measures that the foreign parent company seeks to challenge in this case are directed nominally at its U.S. subsidiaries, those measures inflict injuries directly on the parent that are separate from the injuries suffered by the subsidiaries. Unless the parent is allowed standing to redress its separate injuries, the serious constitutional issues they raise will never be adjudicated.

It is the foreign parent corporation—not its U.S. subsidiaries—that feels the impact of international double taxation under the unitary taxing method. Much of the income to which California seeks to apply its apportionment formula (and its tax rates) has been earned abroad by the parent or its non-U.S. affiliates and has been taxed in the "home countries" of the parent and those affiliates. The income thus subjected to international double taxation is income to which the U.S. subsidiaries have no direct or indirect right. Although the subsidiaries are injured by the larger tax bill that results from the unitary method, that injury is distinct from the double taxation injury suffered by petitioner.

Similarly, the demands for information and the threat of penalties if it is not supplied injure the foreign parent

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[17] *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

in a way that is separate from any injury suffered by the U.S. subsidiaries. Only the parent has access to much of the extremely detailed information concerning foreign affiliates and transactions that California requires. Only the parent will incur the cost of assembling that information, performing the numerous accounting adjustments and currency conversions necessary to comply with California's tax accounting principles, and supplying the information to its U.S. subsidiaries for ultimate transmission to the Franchise Tax Board. And only the parent will be liable if production of the information violates the laws of its home country.

These injuries may go unredressed if the party suffering them is not allowed access to U.S. courts. The U.S. subsidiaries of petitioner do not have direct access to the information necessary to prove petitioner's claims of impermissible double taxation. That information necessarily lies in the hands of the parent company, such as the taxpayer in the *Container* case. Where, as here, California is attempting to tax the income of the parent by claiming it is part of a "unitary" business with its U.S. subsidiaries, it is illogical to decide the issue of standing by separating the "unitary" business into its separate corporate entities, and thus to deny to the parent company the opportunity to prove that the asserted tax places an unconstitutional double taxation burden on it.

III. The Inability To Obtain An Adjudication of the Lawfulness of California's Unitary Taxing Method Threatens To Disrupt U.S. Foreign Relations and International Investment Generally.

At noted above, California's unitary taxing method has impaired investments made in California by members of the UTC.[18] Foreign investment in the United States could be further affected as additional states adopt the worldwide unitary method, as Florida did just three weeks

[18] *See* pp. 2-3.

after this Court's decision in *Container*.[19] Moreover, under the theory of the decisions below, foreign parent corporations would be unable to invoke the jurisdiction of the U.S. courts for protection from other actions nominally taken against their U.S. subsidiaries that violate the parent corporations' rights under the Constitution and international law. If these disincentives compel foreign companies to curtail their U.S. investments, the United States will lose the benefit of the products, technology, services, and employment associated with such investment.

British Prime Minister Thatcher has personally stressed that she considers the problem a serious one.[20] The United Kingdom and other Governments, including those of the Netherlands, all the other European Community nations, Canada, and Japan have made repeated diplomatic protests to the U.S. Government. And in this case, the United Kingdom has joined the other member states of the European communities in submitting a brief amicus curiae, which the UTC endorses.

There is also an undeniable danger that if the rulings below stand uncorrected, U.S. corporations, as a matter of reciprocity, will be denied standing by foreign courts to assert that tax or other measures against their local subsidiaries violate the parents' rights under applicable domestic law. Even more direct reprisals have already been proposed. An amendment to the 1983 Finance (No. 2) Bill was introduced in the British Parliament that would have denied certain tax credits to U.S. corporations established or having an affiliate established in a state

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[19] *Florida's Legislature Is Latest to Approve Unitary Tax Law*, Wall St. J., July 29, 1983, at 29, col. 1. Besides California and Florida, ten other states currently employ the worldwide unitary method. *Id.*

[20] Lewin, *Unitary Tax Scope Widens*, N.Y. Times, Oct. 18, 1983, at D2, col. 1.

that employs the worldwide unitary tax method.[21] Other nations also may consider or take retaliatory actions against American businesses. If other countries imitate the taxing method employed by California, a breakdown of the worldwide consensus in favor of the arm's length approach, and further disruption of international investment, could follow.

CONCLUSION

For the reasons stated in this brief, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MARLOW W. COOK
(Counsel of Record)
COOK, PURCELL, HENDERSON
& ZORACK, CHARTERED
1015 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 659-1050
Counsel for the Unitary Tax Campaign Limited as Amicus Curiae

November 10, 1983

[21] Notice of Amendment to 1983 Finance (No. 2) Bill to Amend the Income and Corporation Taxes Act 1970, § 497, tabled in the House of Commons July 14, 1983.

ANNEXES

ANNEX A

MEMBERS OF UTC SUPPORTING PETITION FOR CERTIORARI

Allied-Lyons plc
Barclays Bank plc
Barratt Developments plc
BAT Industries plc
The BOC Group plc
Bowater Corporation plc
Bunzl plc
The Charterhouse Group plc
Costain Group plc
Dalgety plc
Dunlop Holdings plc
Foseco Minsep plc
Harrisons and Crosfield plc
The Hundred Group of Chartered Accountants
Imperial Chemical Industries plc
Imperial Group plc
Lead Industries Group plc
Lloyds Bank plc
London Chamber of Commerce and Industry
Midland Bank plc
National Westminster Bank plc
The Plessey Company plc
Reckitt and Colman plc
Redland plc
Reed International plc
Sears Holdings plc
Sedgwick Group plc
Tate and Lyle plc
Transport Development Group plc

ANNEX B

CORRESPONDENCE FROM BRITISH GOVERNMENT TO U.S. GOVERNMENT CONCERNING STATE UNITARY TAXATION

[SEAL OF CHANCELLOR OF THE EXCHEQUER]

Treasury Chambers, Parliament Street, SW1P 3AG
01-233 3000

12 July 1983

The Honourable Donald T Regan
Secretary to the Treasury
Washington, DC

Dear Mr. Regan

I am writing to you on the subject of unitary taxation following the recent decision of the United States Supreme Court in the case of Container Corporation of America v The California Franchise Tax Board, upholding the right of a state to use the worldwide combined unitary method of taxation. This method carries a high risk of double taxation, and imposes on international companies a heavy administrative burden. As you know this is a subject on which my predecessor and other colleagues have expressed strong views to you on a number of occasions. It is an issue of considerable concern to Parliament and the British business community.

After the filing of an amicus curiae brief in the Chicago Bridge and Iron case by the United States Solicitor General, we advised British companies to await the Supreme Court's decision before making further representations. We were therefore naturally disappointed with the ruling in the Container case. When these issues do arise it seems to us important that an amicus curiae brief is filed, and I wonder whether the lack of such a brief

might have been a factor in this case. I appreciate that the latest decision does not apply to United States Corporations with foreign parents, which is the issue of most concern to us. However the consequence seems to be that there is little prospect of this particular issue being tested in the Supreme Court in the near future.

I understand that at your meeting on 7 July with the British Ambassador you said that you would probably consider legislative action as a result of the decision. In the circumstances I would welcome this. Following the reservation of the United States Senate on Article 9(4) of the Double Taxation Convention, there were as you know, some misgivings here, when the Convention came before Parliament for ratification in 1980. Nonetheless ratification was approved in the expectation that action by the Administration to eliminate the practice was in hand.

I should be interested to know how you see this developing, and to learn of your proposed timetable. You will of course be aware that this is a matter where there is strong pressure in Parliament. We are keen for the matter to be resolved as soon as possible before possible harm is done to the good relations between our two countries. I hope we shall have an opportunity to let you have our views of any legislation you may be preparing. Geoffrey Howe, who of course also has a close interest in this subject, will see you in Washington this week and looks forward to having further discussions on this with you.

Yours sincerely
/s/ Nigel Lawson

NIGEL LAWSON

BRITISH EMBASSY

3100 Massachusetts Avenue, N.W.
Washington, D.C. 20008
Telephone: (202) 462-1340

17 December 1981

The Honorable Donald T. Regan
Secretary of the Treasury
Department of the Treasury
Room 3326
Main Treasury Building
15th & Pennsylvania Avenue N.W.
Washington, D.C.

Dear Mr. Secretary,

UNITARY TAXATION

I have been asked to deliver to you the attached text of a letter from the Chancellor of the Exchequer of the United Kingdom, on the subject of unitary taxation as it arises in the United States Supreme Court case between Chicago Bridge and Iron Company and Caterpillar Tractor Company/Illinois Department of Revenue.

The top signed copy will follow in a day or so.

Yours sincerely,

/s/ Harry G. Walsh
H. G. WALSH
Counsellor (Economic)

ATTACHED: TEXT.

Letter from the Rt. Hon. Sir Geoffrey Howe, Q.C. M.P., Chancellor of the Exchequer, to The Honorable Donald T. Regan, Secretary of the Treasury.

UNITARY TAXATION

As I mentioned when I saw you on 28 September, the United Kingdom is much concerned about the use of the unitary basis of taxation which is being increasingly adopted by individual US States. The problem is that, while business profits earned outside the US by a UK company operating or having affiliates in the US are not subject to US Federal Tax under our tax treaty, they are subject to taxation in some States. We have in the past requested the US Treasury to take action at the Federal level to remedy this unsatisfactory situation.

It has come to my attention that the Supreme Court has now chosen to hear a case (Chicago Bridge and Iron Company versus Caterpillar Tractor Company/Illinois Department of Revenue) which involves the issue of whether the worldwide combined basis applied at State level is acceptable as a method of company taxation under the US Constitution. While I do not presume to anticipate the Court's eventual decision, this case seems to provide an early opportunity for it to curb the use of the worldwide combined basis for taxing company profits. The continuation of this practice would seem to conflict with the ability of the US Government to speak with one voice on international issues, a requirement which has already been clearly recognised by the Court in the 1979 Japan Line case.

Taxpayers in our two countries, who are potentially subject to both US and UK taxation, receive substantial benefits under our double taxation agreement. This provides for a fair and symmetrical method of attribution of company profits, as between our respective national jurisdiction, to avoid the risk of double taxation of the same income. The benefits of the Treaty are now being

reduced, and the risk of double taxation increased, because some American States do not adhere to the method of attribution agreed at national level for the benefit of our business taxpayers.

I understand that you intend to find a means to put before the Court the US Treasury view that the worldwide combined basis is an arbitrary method of attributing profits, which involves excessive compliance costs for foreign multinational companies established in those states where it is used. It also introduces an undesirably asymmetric element into the tax relationship between our two countries, since the unitary basis of taxation with worldwide combined reporting is not used by the UK at any level of government. This imbalance is causing increasing concern, not only on the part of British companies which have made representations about it, but in Parliament where Questions have been asked. My purpose in writing is to assure you that you have the firm support of the UK Government in putting forward the US Treasury view in this case.